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IN THE

Supreme Court of the United States

October Term, 1963

No. 759

GEORGE THEODORE MUNTON,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION III, STATE OF CALIFORNIA.

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Your petitioner respectfully petitions for a writ of certiorari, directed to the District Court of Appeal, Second Appellate District, Division Three, State of California, to forward the record of that court to this Court and to reverse the judgments of that court affirming the conviction of the petitioner on two counts of violation of Section 288a of the Penal Code of the State of California, and in respect thereto your petitioner sets forth as follows:

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1257, U.S. Codes and by the Rules of this Court.

The decision of the District Court of Appeal, Second Appellate District, State of California, was rendered on July 23, 1963, Crim. No. 8323. A petition for hearing was duly filed in the Supreme Court of the State of California within the time allowed by law and denied on September 18, 1963. A request for extension of time to file the petition for writ of certiorari was filed with the Supreme Court of the United States and the time was extended by the Honorable Justice William O. Douglas to and including January 15, 1964.

Violation of Rights of Due Process of Law under the 14th Amendment of U.S. Constitution were first raised in the Supreme Court of California on Petition for Hearing in that court. The California Supreme Court denied the Petition and thus denied the challenge of violation of Federal Constitution rights.

OPINION BELOW

The opinion below is contained in *People v. Munton*, 218 A.C.A. 558, and is also appended to the petition for hearing in this Court.

STATUTES INVOLVED

Fourteenth Amendment to the Constitution of the United States:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 288a, Penal Code of California:

> "Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year; provided, however, whenever any person is found guilty of the offense specified herein, and it is charged and admitted or found to be true that he is more than 10 years older than his coparticipant in such an act, which coparticipant is under the age of 14, or that he has compelled the other's participation in such an act by force, violence, duress, menace, or threat of great bodily harm, he shall be punished by imprisonment in the state prison for not less than three years. The order of commitment shall expressly state whether a person convicted hereunder is more than 10 years older than his coparticipant and whether such coparticipant is under the age of 14. The order shall also state whether a person convicted hereunder has

compelled coparticipation in his act by force, violence, duress, menace, or threat of great bodily harm."

THE FACTS

Petitioner George Theodore Munton is a theater owner and businessman who operated the Lyric Theater in Huntington Park. A young man named William Wallace, approximately 17 years of age, had worked for petitioner about a year prior to October of 1960. He again applied for work and it is charged that he went with the defendant to a motel at about 1:30 a.m. on October 20 and that the acts charged were committed at that time.

Wallace testified that at the time the petitioner had rehired him petitioner started feeling Wallace's body, took hold of his penis. Later petitioner placed his mouth on his private parts a few seconds. He testifed that on another occasion, about 2 o'clock in the morning, they got liquor and he started to drink and he got intoxicated and about 3:30 in the morning they went to bed, after which petitioner pulled off his shorts and started "copulating" his penis.

After the jury had deliberated and found the petitioner guilty, petitioner was then sentenced to state prison.

Wallace admitted he was just under 17 years of age, he was from a broken home, he had stolen and lied, he

had been arrested for burglarizing at least three homes, for drinking and was a homosexual. (C.T. 32) On the other hand, the evidence showed that the petitioner herein is a man who, for 36 years, has lived an honorable life.

The witness, William Scott Wallace, was trying to get in the Army and in the process he signed a paper before the Army sergeant that everything he said in court was a lie, that he had been approached by a Mrs. Guenther, who told him that she wanted to marry Mr. Munton, the petitioner, and that her parents would not let her with this hanging over his head. He said he told her why he had been turned down in the service and couldn't get a job because of these events and started thinking about changing his story, that he told Mrs. Guenther and she told him to call the lawyer, Hyland, and that he did call Hyland and that he did sign a paper before a notary, before whom he swore to tell the truth, and recanted his previous story. He said that he had later called Sergeant Elmo Robinson, of the Sheriff's office, to tell him what he had done. (R.T. 251-252)

Several favorable affidavits were filed on motion for a new trial of witnesses who stated that they would have testified, had they been called, and petitioner also stated that he had urged his attorney to call these various witnesses but that none of them were called or subpoenaed.

At the time of the trial of this action petitioner's attorney was himself under investigation for a criminal offense, to-wit: theft, and since that time has been convicted of the crime and has been disbarred. A copy of the California Court's opinion disbarring him is attached hereto. In it Hyland appears to have presented a picture of mental incompetence.

However, this did not occur before the opinion of the District Court of Appeal was handed down in this case. Attached hereto is a certified copy of the order disbarring petitioner's attorney and the judgment of conviction of the criminal offenses of petitioner's attorney.

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law in being inadequately and improperly represented by his counsel in the trial of his case.

2. Whether inadequate representation by a mentally incompetent attorney is a denial of due process guaranteed by the 14th Amendment U.S. Constitution.

3. Whether the evidence was insufficient to support the verdicts and judgments, and whether an innocent man has been convicted on false charges growing out of the malice of a discharged employee.

4. Whether Section 288a of the Penal Code of the State of California, inherently and as construed and

applied in this case, is unconstitutional in that words therein are not defined by statute and are too vague, indefinite and uncertain to constitute penal legislation.

REASONS FOR GRANTING THE WRIT

It is necessary to hear this case in order that the defendant may have a fair trial by being adequately represented by competent counsel. When an attorney is incompetent or under such a cloud that he cannot himself properly defend a case, the defendant is not adequately represented by counsel and is denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Powell v. Alabama, 287 U.S. 45, 77 L. Ed. 158.

It is important to determine whether Section 288a of the Penal Code of the State of California, inherently and as construed and applied in this case, is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States.

In *People v. Augier*, [illegible] Cal. App. 2d at 418, the court said:

> "The section of the Penal Code under which the information was drawn makes it a felony for a person to participate in the 'act of copulating the mouth of one person with the sexual organ of another.' That section comes under chapter V of Title IX of the code, which chapter deals with bigamy, incest and the crime against nature. 'The

crime against nature,' as contemplated by the legislature, is the perverted act of uniting the mouth of one participant with the sexual organ of the other with a view of gratifying the sexual desire. A mere contact of the mouth with the sexual organ of another, either by a 'kissing' or a 'licking,' cannot be construed to mean a copulation. The word copulation has never had the meaning of mere contact. It has always had the significance of the verb 'to couple,' which is an English derivative. It is derived from the Latin *copulare,* which is translated 'to couple, join, unite, band or tie together.' (White's Latin Dictionary.) The Latin noun *copula* is translated by the lexicographers as 'that which joins together, as a band, tie or leash.' For over three hundred years the English derivative has had no other significance that that of uniting in sexual intercourse. Its popular significance now and for an indefinite past has been the union of the sexes in the generative act. (Standard Dictionary; Webster's International Dictinoary.) The Oxford Dictionary (1893) defines the word thus: 'To unite in sexual intercourse.' In Stark's Elementary Natural History (1828) it is given the same usage. Goldsmith's Natural History (1874) refers to the 'copulating season.' In Quick Dec. Wife's Sister (1703) appears: 'An hainous sin . . . in the brother to have copulated with this widow.' In the King James translation (1611) of Leviticus, 15: 16-18, we find that the Mosaic laws ordained that 'the woman with whom man shall lie with seed of *copulation,* they shall both bathe,' etc.

"Thus does it appear that since Shakespeare reinforced the static character of the English idiom the word copulate has had primarily an unvarying significance, to wit, the act of gratifying sexual desire by the union of the sexual organs of two biological entities. This is the meaning of the word wherever found in statutes and decisions. (14 C.J.S. 1315; 18 C.J.S. 130; 13 C.J. 933.) Therefore the legislature, in framing section 288a of the Penal Code, must have intended to punish only those who participate in an act whereby they are *united* or joined by the perverted act of one's holding in his mouth the sexual organ of another for the purpose of gratifying their sexual desires. A mere kiss or lick of the private organ, even though lewdly done (Pen. Code, sec. 288), is not a copulation."

The word "copulate" apparently has an ordinary meaning of sexual intercourse, not oral connection, as defined in Latin as fallatio. It is a different thing than copulation. Copulation means an actual act of intercourse. The language of the statute is itself incongruous and inconsistent, since there can be no copulation by oral contact. This is not copulation.

It is also necessary for this Court to grant a hearing to determine whether the evidence on the motion for a new trial required the court to grant a new trial in the light of the fact that there was an actual suppression of the evidence through the incompetence of counsel and the failure to call several witnesses.

WHEREFORE, petitioner prays that this Honorable Court grant certiorari, reverse the judgments below and order the cause dismissed.

Respectfully submitted.

MORRIS LAVINE,
Attorney for Petitioner.

APPENDIX "A"

SHINN, P.J.—charged in seven counts with violation of Sec. 288a, violation of Sec. 286 (sodomy), and an attempted violation of sec. 286 of the Penal Code, the defendant, GEORGE THEODORE MUNTON, was found guilty in a jury trial on counts I, II and VII. Count I charged a violation of sec. 288a and count II charged a violation of sec. 286. The victim in both counts was William Wallace, a boy approximately 17 years of age. Count VII charged an attempted violation of sec. 286 on Richard Bailey, a boy also approximately 17 years of age. Defendant was found not guilty on counts III, IV, V and VI, which were identical, except as to times, with counts I and II. Defendant's motion for a new trial was denied. New attorneys were substituted for the trial attorney and they moved for a rehearing of defendant's motion for a new trial. This motion was denied. Pursuant to section 5500 et seq. of the Welfare and Institutions Code, and upon the reports of doctors under appointment by the court, the defendant was adjudged a probable sexual psychopath and committed to Atascadero State Hospital. Four months later, upon receipt of a report from the superintendent of the hospital, the defendant was returned to the court and found not to be a sexual psychopath. Defendant's motion for a new trial was renewed and denied. Probation being denied.

defendant was sentenced to state prison. He appeals from the judgment and from undescribed "orders" in the case. The purported appeal from the "orders" is dismissed.

Counts I and II charged commissions of the offenses October 20, 1960; counts III and IV alleged offenses committed October 21 and counts V and VI alleged commission of the offenses October 23, all against WILLIAM WALLACE and count VII alleged commission of the offense against RICHARD H. BAILEY November 10, 1960.

Defendant operated the Lyric motion picture theater in Huntington Park in Los Angeles County. About a year prior to October 1960 WALLACE had worked for defendant at the theater. Early in October he applied for reemployment. WALLACE testified that the offenses charged in counts III, IV, V and VI upon which defendant was acquitted occurred either in the office of defendant at the theater or in a motel on Ventura Boulevard and that the offenses charged in counts I and II were committed at the motel. He testified that he was taken by defendant to the motel at about 1:30 a.m. on October 20th; defendant registered for himself and another and obtained a room which he and defendant used and in which the offenses were committed; both remained there until about 11 a.m. when they left together. Defendant was well known to the proprietor of the motel, a Mr. Butler, and had

used a room in the motel 18 times during the month of October. Mr. Butler testified to the registration by defendant of himself and another person about 1:30 a.m. and to having seen defendant and WALLACE leave the motel together at about 11 a.m.

It is a fair inference that defendant was acquitted upon counts III to VI, inclusive, not because the jury disbelieved the testimony of WALLACE but because he was found to be an accomplice and that his testimony was uncorroborated; presumably the convictions on counts I and II were due to the determination of the jury that the testimony of WALLACE as to those offenses was sufficiently corroborated.

(1) The contention, first to be considered, that defendant was inadequately represented by counsel and thus deprived of a fair trial, requires a consideration of the showing made by defendant upon his motion for a new trial. Sixteen affidavits were filed in support of the motion. Among them were affidavits by WALLACE and BAILEY repudiating the testimony they had given at the trial. Upon the hearing of the motion WALLACE testified that he had believed it was necessary for him to deny participation in the unlawful acts in order to enlist in the armed services, and he reaffirmed his former testimony. There was no showing that the matters to which the other affidavits related were newly discovered and for this reason, alone, they could not have furnished a ground for granting the motion. (Pen. Code, Sec. 1181.)

The affidavits were filed in support of defendant's contention that he had been deprived of due process in that he had not been adequately represented at the trial. There was a showing by affidavit that defendant's attorney was informed before the trial of the testimony that would have been given by the affiants and that he failed to call several of them as witnesses and failed to elicit in his examination of the others all that they knew that would have been helpful to defendant. The affiants were in the main employees of the defendant and their statements were designed to contradict the testimony of WALLACE and BAILEY in several particulars. Both WALLACE and BAILEY had testified that defendant induced them to drink considerable quantities of liquor and that he had caused them to disrobe and put only trunks on and that they remained in his office for considerable periods of time. The affidavits were generally to the effect that the affiants had never known defendant to use liquor or have it in his office, had never known him to have his office door locked and had never known WALLACE to go to defendant's office and remain for more than a very few minutes. Such negative testimony could have made little impression upon the jury. One of the affiants would have testified to facts indicating that WALLACE had upon other occasions indulged in unlawful sexual activities with other persons. It is now urged that although defendant's attorney was informed as to the testimony these persons would give

he was grossly incompetent and negligent in not calling all of them as witnesses and in not developing the testimony of those who were called in greater detail. The contention that defendant was deprived of a fair trial through the incompetence of his attorney merits no extended discussion. Six of the persons who made affidavits had testified in the trial on defendant's behalf; they testified to the substance of the matters stated in their affidavits. The People's witnesses were vigorously and adequately cross-examined; such defense as defendant had was adequately presented. The showing made by defendant was manifestly inadequate to furnish support for his claim that he was denied his right to a fair trial. (See *People v. Moten*, 207 Cal. App. 2d 692 (24 Cal. Rptr. 716); *People v. Monk*, 56 Cal. 2d, 288 (14 Cal. Rptr. 633; 363 P. 2d 865); *People v. Prado*, 190 Cal. App. 2d 374 (12 Cal. Rptr. 141).)

Moreover, the testimony which defendant claims was not properly developed related to what might or might not have occurred in defendant's office and not to the occurrences in the motel as charged in counts I and II, upon which defendant was convicted. The statements were relevant to the charge in count VII, which we shall discuss later. If defendant could have benefitted to some extent through more detailed testimony by these witnesses, it is clear that he suffered no prejudice if their testimony was somewhat abbreviated.

(2a) The jury could not have failed to find that

at least as to the offenses charged in counts I and II WALLACE was an accomplice and as we have said, it was a reasonable inference that they found him to be an accomplice in the commission of the other charged offenses.

Our question is whether we can hold as a matter of law that the testimony of WALLACE as to the events occurring on October 20th was insufficiently corroborated. We cannot say this. The Lyric Theater was located in Huntington Park. The motel on Ventura Boulevard was miles away in the San Fernando Valley. Chatsworth, where defendant's sister resided, is still further away and beyond the motel in question. Culver City is located on the way to Santa Monica at the ocean. It is many miles removed from the location of the motel and is reached by entirely different routes. The signifiance of these facts appears from the testimony of defendant as to his activities on the night of October 20th. He admitted having taken WALLACE to the motel, his only reason being that he wanted to put him up somewhere for the night. WALLACE lived but a short distance from the theater. Defendant had an apartment in Beverly Hills but he did not take Wallace to the apartment for the reason that a female friend was using it at the time. He preferred Butler's motel for the reason that he was acquainted with Butler and was accustomed to staying there. He intended to visit his sister in Chatsworth the following morning and thought it would be convenient to pick

up Wallace at the motel on his way from his sister's to Huntington Park. He registered for himself as well as for WALLACE for the reason that he intended to leave WALLACE at the motel but to return there early in the morning to order to shave and shower. He testified that after he had obtained the room he drove to Culver City some time after 2 a.m. in order to loan a woman friend $100, which both he and she testified was given her in cash, for which she gave him a due bill. He remained several hours in her apartment and returned to the motel about 6 a.m. where he shaved and showered, and had breakfast at a nearby cafe. At about 11 o'clock he drove WALLACE back to the theater, then drove to Chatsworth to see his sister and back to Huntington Park. He denied having spent any part of the night in the motel and, of course, denied having committed any unlawful acts. A police officer testified that after the arrest of defendant, when questioned, he denied having taken WALLACE to the motel.

(3) The question on appeal is whether the corroborating evidence tended to connect defendant with the commission of the crime in such a way as might reasonably have satisfied the jury that the corroborator was telling the truth. (*People v. MacEwing*, 45 Cal. 2d 218 (288 P. 2d 257).) (4) The weight to be given to corroborating evidence is for the jury, whose verdict will not be disturbed on appeal unless it is clear that

on no hypothesis can it stand. (19 Cal. Jur. 2d, Evidence, Sec. 409; *People v. Trujillo*, 32 Cal. 2d 105 (194 P. 2d 681)).

(2b) Defendant cites *People v. Robbins*, 171 Cal. 466 (154 P. 317), as a case which supports his contention. The defendant, after a tennis game, took a boy into the bathroom to shower; the window blind was drawn, the door locked and the water in the shower was turned on. It was held that these facts provided insufficient corroboration of the testimony of the boy that an unlawful act was committed by the defendant. The facts of the present case are quite different. Defendant had a purpose in taking the boy to the motel. He was well known at the motel and no doubt knew that no questions would be asked by the management. He undoubtedly realized that if he admitted having spent the second half of the night in the room with the boy the jury would be convinced that his purpose was evil. The fact that two men or a man and a 17-year old boy sleep side by side in a bed does not suggest to the normal mind the commission of immoral acts. It might be the most natural and reasonable thing for them to do. With a clear conscience they would not deem it necessary to deny having slept side by side. But defendant not only denied to the officer having taken the boy to the motel, he went to great pains to prove that after having registered himself and the boy he spent the remainder of the night elsewhere. His ex-

planation that he incurred a greater charge in having registered for two persons for the reason that he intended to return later in the morning to shave and shower did not sound reasonable in view of the fact that he was a regular customer of the motel and a friend of Butler's. The jury could reasonably have concluded that defendant registered for two persons because he intended to remain in the room and that his explanation of not having done so was fabricated. If he had offered an explantion that the jury deemed logical and reasonable, the jury no doubt would have given him the benefit of the doubt and would have believed his denial of having committed unlawful acts. But when he denied to the officer having taken the boy to the motel, and later admitted having done so, and came forward with no logical reason for his conduct and no reasonable account of his actions, it was not unreasonable for the jury to conclude that his purpose throughout was evil and that his conduct and admissions, considered independently, furnished adequate corroboration for the testimony of WALLACE. As previously stated, we hold that the corroborating evidence was sufficient.

(5) At the preliminary examination, BAILEY testified to the acts charged in count VII. At the time of trial, he was absent from the state and his testimony at the preliminary was read into evidence. He described the circumstances of the offense charged in count VII.

He was 17 years of age. He went to the theater to obtain employment. In the theater office defendant told him that "we" were going to rehearse for the showing of a picture by the name of "NUDE SET." Defendant plied him with about three cups of wine, followed by whiskey. Defendant persuaded him to take off his clothes and put on a set of trunks. WALLACE came in and BAILEY put his clothes back on. Defendant again persuaded him to put the trunks on which he did, and persuaded WALLACE to get undressed. They then had some more drinks. Defendant and WALLACE, acting at the direction of defendant, tied up BAILEY with cords. Defendant then struck BAILEY a couple of times with a small belt and induced WALLACE also to strike BAILEY. While BAILEY was tied up he lay face down at the direction of defendant. He was fondled by defendant and by WALLACE. There was talk about sexual activities and defendant asked BAILEY whether he had ever indulged in them. BAILEY answered that he had not and did not intend to. While it would appear from the testimony of BAILEY that defendant had in mind the commission of violation of sec. 286, it is also clear that he did not make an attempt to commit the act. Tying BAILEY up was not intended to overcome any possible resistance upon his part and no felonious advantage was taken or attempted of BAILEY'S condition while he was tied. Defendant cannot be punished for what was in his mind. BAILEY'S testimony disproves the use by defendant

of any physical effort which would constitute even a slight attempt to commit a violation of sec. 286. Tying BAILEY up and striking him upon his bare back with a leather belt was a manifestation of a sadistic impulse and a gratification of a form of sexual desire. But it would seem to have been an assault upon BAILEY'S person distinctly apart in nature and purpose from an effort or attempt to commit the act with which defendant was charged. However evil defendant's intentions were, it is clear from the testimony of BAILEY that defendant did nothing that would constitute an attempt to commit the offense for which he was prosecuted upon count VII.

The judgment is affirmed as to the convictions under counts I and II and reversed as to the conviction under count VII.

FORD, J., and FILES, J., concurred.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

WILLIAM JOHN HYLAND III, Petitioner,) L.A. 27040
vs.)
THE STATE BAR OF CALIFORNIA, Respondent.) L.A. 27041

[Filed Jun. 13, 1963, William I. Sullivan Clerk].

BY THE COURT

In two proceedings before local administrative committees of the State Bar (for Los Angeles County) petitioner was found guilty of four counts of professional misconduct. In both proceedings the Board of Governors of the State Bar adopted, with minor modifications, the findings of the local committees and recommended disbarment.

Petitioner seeks review of both proceedings. He contends, without elaboration, that the "recommendations and findings of the Board of Governors were based upon insufficient evidence and are contrary to law." This unsupported allegation does not fulfill the requirements of Rule 59 (a) of the California Rules

of Court and does not sustain petitioner's burden of showing that the action of the Board of Governors is erroneous or unlawful. (Bus. & Prof. Code, § 6083; Hatch v. State Bar, 55 Cal. 2d 127, 128.) Moreover, we have reviewed the record and found that the board's findings and recommendations are sustained by the evidence.

Petitioner graduated from the University of Pennsylvania and from Harvard Law School, and was admitted to practice in California in 1952. The transactions that led to these proceedings occurred between 1954 and 1959.

The first matter involves petitioner's representation of Mrs. Hazel D. Hahn, a 61-year-old widow. The board found and the evidence shows that on May 14, 1954, Mrs. Hahn retained petitioner to represent her in the sale of certain real property. A few days later, petitioner prevailed upon Mrs. Hahn to sign various documents, including a deed conveying title to the real property to petitioner, as trustee for himself, Mrs. Hahn, and a third party, and a five-year option in petitioner's favor on the real property, for which he gave no consideration. Petitioner did not explain these documents to Mrs. Hahn, and she did not understand what they were.

Thereafter, petitioner sold an option on the real property, and later an extension of the option, for which he received $9,000. The option was never exer-

cised. He entered into an agreement to sell the property to a religious organization. The organization took possession, and invested $20,000 in the property, including payments on existing encumbrances. Petitioner then agreed to buy out the organization for $25,000. He failed to make payments as agreed. Over a period of nine months several extensions of time to make payment were agreed upon, and still petitioner failed to pay. At the end of that period, he persuaded the organization to accept $16,500 for its interest.

These transactions were entered into without the knowledge or consent of Mrs. Hahn. In October, 1956, petitioner sold the property for $91,000. He wilfully failed and refused to render an accounting of the proceeds to Mrs. Hahn. Mrs. Hahn sued petitioner and obtained a $10,000 default judgment, and ultimately recovered $3,500 from the proceeds of the sale in escrow.

The evidence shows that petitioner disregarded his fiduciary duty to his client and assumed a position adverse to her in the sale of her property. He commingled funds he held as trustee with his personal funds. Because petitioner failed to keep records, the exact amount that he converted to his own use without his client's knowledge or consent cannot be determined. Even crediting the many unsubstantiated expenses claimed by petitioner, however, the board's finding that no less than $2,800 was so converted is sustained by the evidence.

In the second matter petitioner was retained by Melvin Hassler in April, 1957, to prosecute a claim for personal injuries and property damage. The written retainer agreement provided that petitioner was to receive one-third of the amount recovered if the matter was settled without court action. No court action was instituted and in July, 1957, the matter was settled for $4,500. The insurer of the party obligated to pay sent petitioner a draft for $4,500 payable to Hassler, his insurer, and petitioner. Petitioner obtained the endorsement of Hassler and his insurer, and on July 26, 1957, negotiated the draft for cash at the Wilshire-Oxford Branch of the California Bank.

The board found and the evidence shows that petitioner thereafter converted the entire proceeds of the draft to his own use without the knowledge or consent of Hassler and without rendering an accounting to Hassler. Hassler made repeated unsuccessful efforts to collect the sum due him from petitioner. In April, 1958, petitioner sent Hassler a check for $2,204 and a promissory note for the same amount. Neither the check nor the note was signed. Petitioner explained to Hassler a few days later that if Hassler wished to lend him the money, petitioner would sign the note, and if Hassler did not wish to lend the money, petitioner would sign the check. Hassler made no decision until August, 1958, when he asked petitioner for the money. Petitioner said that he did not have the money avail-

able, but signed the check and asked Hassler to hold it for a few days. He said he would notify Hassler when the money was in the bank.

After waiting for a week or two weeks Hassler deposited the check. It was returned to him marked "refer to maker." He again asked petitioner for the money but did not receive it. In January, 1959, petitioner sent Hassler a proposed agreement and asked him if he wished to invest the money due him in a radio station. Hassler did not sign the agreement. He complained to the State Bar in January, 1960.

Petitioner claims that he paid Hassler a total of $2,750. There is no evidence to substantiate that claim. Even if it is true, however, petitioner admits that he paid Hassler nothing before 1959 and that in addition to the $2,750 he claims to have paid, $600 was due. By his own admission, therefore, the check he wrote for $2,204 in 1958, even had it been honored, was less than the amount he owed Hassler.

In the third matter, petitioner was employed in March, 1959, to defend Kenneth W. Matthews in a criminal action in which Matthews was charged with issuing bad checks. Matthews informed petitioner that he believed the amount of his worthless checks held by the police was about $1,800. Petitioner suggested that Matthews' chances of probation would be increased if he made restitution prior to sentencing, and for that

purpose Matthews requested $1,800 from his brother, Teddie W. Matthews. Teddie turned over a check in that amount to petitioner, after telling petitioner that the funds were to be used only to redeem bad checks and were not to be delivered to Kenneth. Petitioner signed the following writing: "March 26, 1959. Received from Teddie W. Matthews $1,800 Cashier's Check for payment on bad checks of Ken Matthews. An accounting is to be rendered to Teddie W. Matthews at close of Ken Matthews case. W. J. Hyland." Petitioner deposited the check in the Reseda Branch of the Bank of America, opening a new trust account under the name of "W. J. Hyland III, Trustee Account."

The evidence sustains the board's findings that petitioner thereafter wilfully commingled these trust funds with his own funds, that he wilfully misappropriated some of the trust funds, and that he wilfully failed to render an accounting to Teddie W. Matthews. In violation of the trust, petitioner gave Kenneth $250 of the trust fund. At least $55 of that sum was used for purposes other than redeeming bad checks. Petitioner appropriated $425 from the trust fund as his fee for representing Kenneth. Teddie did not consent to either appropriation, and only learned of them sometime after they occurred. Petitioner ignored Teddie's protests, and never met his demands for an accounting.

The evidence regarding the disposition of the balance of the trust fund is in conflict. Petitioner failed to produce any adequate records. His testimony on the matter is inconsistent in several respects and is contradicted by other evidence. The bank records and the testimony of Kenneth and another witness sustain the board's finding that petitioner wilfully converted and commingled with his own funds some $780 of the trust funds in addition to the $425 he took as his fee.

The fourth matter concerns petitioner's representation of Edward J. Preston in Wyoming Pacific Oil Co. v. Preston, an action filed in the Los Angeles County Superior Court in 1952. Preston retained petitioner in February or March, 1955, shortly after service of the complaint upon him by the attorney for Wyoming Pacific. On March 16, 1955, Preston's default was entered in the Wyoming Pacific action. Petitioner learned of the entry of default sometime in March. He informed Preston that he would move to set aside the default, but in fact he did nothing. In the following months Preston frequently questioned petitioner about the status of the case, and on each occasion was told in substance that he should let petitioner do the worrying, that petitioner was the lawyer, and that everything was under control.

In November, 1957, Preston's default in the Wyoming Pacific action was proved and a $6,185,000 judgment against him was entered. The judgment was re-

ported in the Los Angeles newspapers, and a friend of Preston's who read the article clipped it out and sent it to Preston in Montana. Preston immediately called petitioner. Petitioner was not aware of the judgment, but he assured Preston that he would take steps to have it vacated.

Petitioner at this time mistakenly believed that under section 473 of the Code of Civil Procedure the six-month period for setting aside a default ran from the entry of judgment. An associate of petitioner's, having noticed the newspaper report, researched the problem and discovered that contrary to petitioner's interpretation the time for setting aside a default under section 473 runs from the entry of default. Petitioner asked a second associate to research the problem, and that associate reached the same conclusion.

On November 29, 1957, petitioner met with Mr. and Mrs. Preston and another attorney. Petitioner announced that he had an "ace in the hole" because there had been no summons on the complaint served on Preston. Preston directed petitioner to move immediately to set aside the judgment, and petitioner assured him that he would.

Petitioner took no action to set aside the judgment before January 23, 1958. On that date, Preston learned from his attorney in Chicago that petitioner had done nothing about the judgment. On the same day, he

notified petitioner by telegram that he was discharged. Although he knew he was discharged, petitioner on January 27, 1958, caused the filing of a complaint in Preston's name. Preston had not seen the complaint, but petitioner attached to it a verification that Preston previously had signed in blank at petitioner's request. The verification was notarized at petitioner's request by L. G. Wurst, an associate of petitioner's in an accounting business. Preston was in Chicago on the date of the purported notarization, and never appeared before Wurst.

Preston then retained a Los Angeles attorney to move to set aside the Wyoming Pacific judgment. Petitioner assured the attorney that there was no summons on the complaint when it was delivered to him, and that no alterations had been made to the complaint since it was delivered. Petitioner signed an affidavit to that effect. In reliance on petitioner's statements, Preston signed a similar affidavit, though he had no independent recollection of the facts sworn to.

At the hearing on the motion to set aside the judgment petitioner testified that when he received the complaint from Preston there was no summons attached to it, that no alterations were subsequently made to it, that he did not affix a new blue backer to the complaint, and that the handwriting on the blue backer

was not his. The judge ruled that a summons was attached to the complaint served upon Preston, and denied the motion to set aside the judgment. The order was affirmed on appeal. (Wyoming Pacific Oil Co. v. Preston, 171 Cal. App. 2d 735.)

The Board of Governors found that petitioner wilfully disregarded Preston's instructions to take action in setting aside the default, that he falsely informed Preston that he was fully protecting Preston's interests, and that although petitioner did not wilfully misinterpret section 473 he did wilfully fail to formulate any ground for relief based upon mistake, inadvertence, surprise or excusable neglect. The board also found that petitioner acted as attorney for Preston after he knew he had been discharged, that he obtained Preston's signature on a blank verification, that the verification was used on a complaint filed by petitioner for Preston without Preston's knowledge, and that petitioner obtained a false notarization of the verification. These findings are supported by undisputed evidence.

The board also found that a summons was attached to the complaint served on Preston and delivered to petitioner, that thereafter the summons and blue backer were removed and a new blue backer bearing petitioner's handwriting was attached, and that petitioner was aware of these facts when he falsely testified to the contrary. These findings are sustained by the evi-

dence. The attorney who served the complaint on Preston testified that a summons was attached. His secretary, who prepared and assembled the complaint and summons, testified that a summons was attached. One of petitioner's associates testified that when he observed the complaint in petitioner's files there was a summons attached. A handwriting expert testified that in his opinion the handwriting on the blue backer was the petitioner's. From the time petitioner was hired until judgment was entered, he never mentioned that no summons was attached to the complaint, although he discussed the case with the attorney who served the complaint on Preston, and with his two associates, whose research in the matter was based on the assumption that a summons was attached. In October, 1956, petitioner sent a letter to Preston in which he stated his theory of the case and the alternative courses of action that were possible. The letter contains nothing to indicate that no summons was attached to the complaint. Petitioner attempted to explain away this evidence, but his testimony is not convincing. The explanations he offered were not only implausible but were contradicted by his testimony at the hearing on the motion to set aside the Wyoming Pacific judgment and by his testimony before the preliminary hearing committee in this proceeding.

The evidence in these four matters justifies the Board of Governors' recommendation that petitioner be disbarred. Each matter involves several acts of pro-

fessional misconduct, and each is serious enough to justify disciplinary action. Together they show that within two years of his admission to the Bar petitioner fell into a pattern of misconduct that continued until these disciplinary proceedings began. The record reveals no extenuating circumstances. We agree with the board that petitioner cannot be recommended to the public as a person worthy of trust and that he therefore is not entitled to continue to practice law.

Petitioner also contends that the findings and recommendations of the Board of Governors should be set aside and the matter remanded for further hearings, on the ground that he was without funds to employ an attorney and the State Bar failed to appoint one to represent him.

Under section 6085 of the Business and Professions Code, petitioner was entitled to a "reasonable opportunity and right . . . to be represented by counsel." Petitioner was afforded that right here. He represented himself in the hearings before the local administrative committee, and was represented by other counsel before the Board of Governors. He never indicated to the local committee that he wished to have counsel appointed for him. Hearings in these matters were held on nineteen separate occasions over a period of nineteen months. At the sixteenth hearing petitioner indicated that he was negotiating with two attorneys

and would be represented by one of them at future hearings. At the seventeenth hearing he indicated that he could not pay the retainer demanded by the attorneys, and that he would therefore continue to represent himself. Although at that point the committee properly might have appointed counsel for petitioner, its failure to do so did not deprive him of "a reasonable opportunity" to be represented. The committee reasonably concluded that petitioner preferred to represent himself. Having chosen to represent himself, petitioner cannot now, after an adverse result, assert for the first time that counsel should have been appointed for him.

Petitioner finally contends that this Court should order further hearings before the State Bar in order that he may present evidence of his mental incompetence at the time of the offenses involved in these proceedings. In support of this contention petitioner alleges that from 1955 to 1960 he had marital difficulties that rendered him mentally incompetent; that in December, 1960, he recovered completely; that his mental incompetence constitutes a valid defense to the charges against him; and that he did not present this defense at the local committee hearings because he was not then aware that it was a valid defense.

The purpose of a disciplinary proceeding under the State Bar Act is to protect the public, not to punish the offending attorney. (Resner v. State Bar, 53

Cal. 2d 605, 613; In re Rothrock, 16 Cal. 2d 449, 454.) The need for protection is the same whether or not the attorney is mentally incompetent. If, however, an attorney's mental incompetence rendes him unable to form the intent that is an element of the offenses charged, then he should not be disciplined for the offenses, but should be prohibited from practicing law during the continuance of his mental incompetence. The appropriate remedy is not disbarment or suspension, but enrollment as an inactive member of the Bar, with the opportunity of becoming an active member upon a determination that mental competence has been restored. (Cf. Bus. & Prof. Code, § 6007.)

Even though mental incompetence is a defense in State Bar disciplinary proceedings, we conclude that the showing made by petitioner does not justify reopening hearings before the Board of Governors. Petitioner is not excused from presenting his defenses at the local committee hearings simply because he did not know mental incompetence was a defense. Mental incompetence has been considered in previous State Bar disciplinary proceedings, and petitioner is charged with knowledge of those cases. (See In re Freiburghouse, 52 Cal. 2d 514, 515-516; Cane v. State Bar, 14 Cal. 2d 597, 601.) Moreover, the Board of Governors granted petitioner an opportunity to support his allegations of mental incompetence, and he failed to do so. On February 15, 1962, on motion of his counsel, petitioner was granted a 30-day extension to produce evi-

dence in support of his allegations. The motion was supported by the affidavit of Dr. James Solomon, who stated that he had known petitioner for one year (1961), that during that period petitioner appeared to be "restless, agitated, tremulous, emotionally disturbed generally," and that further time was required for him to fully evaluate petitioner's mental condition.

Petitioner never presented further evidence to the board. On March 29, 1962, his counsel requested an extension of time because of "various problems." The request was denied. On April 19, 1962, the board determined the cases, and recommended disbarment. On May 26, 1962, petitioner again moved for an extension of time. He offered no evidence in support of his allegations and the request was denied.

The records in this case were filed with this Court on August 14, 1962. After several extensions of time, counsel for petitioner on April 5, 1963, filed a brief in support of the petition for review filed on October 15, 1962. He has not filed any documents in support of his defense of mental incompetence. In view of the length of time petitioner has already had to substantiate his claims, we conclude that his allegations are specious and that no further time should be given.

It is ordered that the petitioner, William John Hyland III, be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys, effective 30 days after the filing of this opinion.

[I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.]

[Witness my hand and the Seal of the Court this 10th day of January, A.D. 1964.]

WILLIAM I. SULLIVAN

By R. JOHNSON
Deputy Clerk

APPENDIX "C"

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 47

Dec. 12, 1963 Present Hon. Samuel R. Blake, Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, vs.

WILLIAM JOHN HYLAND, 257504
MARY B. GOODWIN and
HEDWIG ROMANA HUBSCHER

Deputy District Attorneys John Hatch and David Feldman; Defendants William John Hyland and Hedwig Romana Hubscher with counsel, John H. Marshall and Defendant Mary B. Goodwin with counsel, Deputy Public Defender W. F. Littlefield, present. At 9:05 A.M., the bailiffs bring the jurors into court and the jury resumes deliberating. At 12 Noon, the bailiffs take the jurors to lunch, and at 1:25 P.M., the jury resumes deliberating. At 3:10 P.M., the jurors are brought into court; counsel and defendants are present. The jury is questioned about the probability of verdicts being reached and at 3:20 P.M., the jury resumes deliberating. At 4:12 P.M., the jury is brought into

court. The jury states to the court that verdicts have been reached on some but not all counts as to all defendants. All counsel and parties consent that the Court receive all the verdicts agreed upon and as to those counts where no verdicts have been agreed upon, disposition thereof will be left to the Court's discretion. Thereupon, the jury return the following verdicts, to wit:

TITLE OF COURT AND CAUSE

"We, the Jury in the above entitled action, find the Defendant William John Hyland, guilty of Forgery in Violation of Section 470 Penal Code of California, a felony, as charged in Count II of the information."

This 12 day of December 1963. Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant William John Hyland, guilty of Forgery, in Violation of Sectoin 470 Penal Code of California, a felony, as charged in Count III of the information."

This 12 day of December 1963. Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant William John Hyland, guilty of Forgery, in Violation of Section 470 Penal Code of California, a felony, as charged in Count IV of the information."

This 12 day of December 1963. Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant William John Hyland, guilty of Violation of Section 115 Penal Code, a felony, as charged in Count V of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant William John Hyland, guilty of Grand Theft, in Violation of Section 487, Subdivision 1, Penal Code of California, a felony, as charged in Count VI of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant William John Hyland, guilty of Grand Theft, in Violation of Section 487, Subdivision 1, Penal Code of California, a felony, as charged in Count VII of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant William John Hyland, guilty of Grand Theft, in Violation of Section 487, Subdivision 1, Penal Code of California, a felony, as charged in Count VIII of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant William John Hyland, not guilty of Grand Theft, in Violation of Section 487, Subdivision 3, Penal Code of California, a felony, as charged in Count IX of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant William John Hyland, guilty of Issuing Check Without Sufficient Funds, in Violation of Section 476a, Penal Code of California, a felony, as charged in Count X of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant Mary B. Goodwin, guilty of Violation of Section 115, Penal Code, a felony, as charged in Count V of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant Mary B. Goodwin, not guilty of Grand Theft, in Violation of Section 487, Subdivision 3, Penal Code of California, a felony, as charged in Count IX of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant Hedwig Romana Hubscher, not guilty of Grand Theft, in Violation of Section 487, Subdivision 1, Penal Code of California, a felony, as charged in Count VI of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant Hedwig Romana Hubscher, not guilty of Grand Theft, in Violation of Section 487, Subdivision 1, Penal Code of California, a felony, as charged in Count VIII of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

"We, the Jury in the above entitled action, find the Defendant Hedwig Romana Hubscher, not guilty of Grand Theft, in Violation of Section 487, Subdivision 3, Penal Code of California, a felony, as charged in Count IX of the information."

This 12 day of December 1963, Francis Ferdinand Rosehart, Foreman.

The jury is polled as to each of the "Guilty" verdicts, and as to each the verdict is unanimous. Polling of the jury as to the "Not Guilty" verdicts is

waived by all counsel. Thereupon, it appearing to the Court, there is no reasonable probability of the jury agreeing on the remaining counts as to each defendant, the Court orders that as to those remaining counts to wit: Defendant Hyland, Count 1, Defendant Goodwin, Counts 1, 2, 3, 4, 6, 7, 8 and 10, and Defendant Hubscher, Counts 1, 2, 3, 4, 5, 7 and 10, said defendants be re-tried, and the jury and the alternates are discharged from further service herein. The court orders the verdicts recorded as read and reading of the said verdicts as recorded is waived. The verdicts and the unused verdict forms submitted to the jury, and the instructions given and refused are filed. Defendants Goodwin and Hyland each move for new trial. Waive time for sentence and requests time to file application for probation. A Probation Officer's report is ordered. Motion for new trial and further proceedings as to said defendants set January 23, 1964, 9 A.M. As to counts as to each defendant on which no verdict reached, said matters are continued to January 23, 1964, 9 A.M. Each Remain on own recognizance.

[This minute order was entered Dec. 17, 1963, William G. Sharp, County Clerk and Clerk of the Superior Court. By C. A. Rhetta, Deputy].

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IN THE

Supreme Court of the United States

October Term, 1963
No. 759

GEORGE THEODORE MUNTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

On July 23, 1963, the California District Court of Appeal, Second Appellate District, Division Three, rendered its opinion unanimously affirming petitioner's conviction in the Superior Court of Los Angeles County of one count of sodomy and one count of oral copulation, and reversing petitioner's conviction on one count of attempted sodomy. The opinion is attached to the petition for writ of certiorari as Appendix A, and is reported as *People v. Munton*, 218 A. C. A. 358, 32 Cal. Rptr. 508. The California Supreme Court denied a hearing in the case September 18, 1963. None of the justices voted in favor of a hearing. (60 A. C. No. 10, Minutes, p. 2.)

Jurisdictional Statement.

The jurisdictional ground is set forth in the Petition (p. 2), *i.e.*, 28 U. S. C. § 1257(3).

Questions Presented.

The questions presented by petitioner are, essentially, as follows:

1. Whether or not Section 288a of the Penal Code (which makes oral copulation a crime), is unconstitutional for vagueness.

2. Whether or not the evidence is sufficient to support the conviction.

3. Whether or not the representation of petitioner by private counsel at his trial was so inadequate to constitute a violation of the due process clause of the Fourteenth Amendment, because of

a. The subsequent disbarment of the trial counsel, for offenses unrelated to petitioner's trial.

b. The alleged mental incompetence of the trial counsel;

c. The actual conduct of the trial by counsel.

Statement of the Case.

For a factual statement of the case, respondent (hereinafter referred to as California) incorporates by reference the opinion of the District Court of Appeal in this case, which is found as Appendix A to the Petition.

California wishes to correct two errors in Petitioner's Statement of Facts. The first of these occurs in the following sentence:

> "Wallace admitted [1] he was just under 17 years of age, [2] he was from a broken home, [3] he had stolen, [4] and lied, [5] he had been arrested for burglarising at least three homes, [6] for drinking, [7] and was a homosexual. (C. T. 32.)". (Petition, pp. 4-5, numbers added.)

California submits that of the seven separate statements contained in the above sentence, support can be found in the record for only two of them. California agrees that Wallace admitted the age as listed above [1], and that he had lied [4]. The reference cited by petitioner for the other five statements, however, "[C.T. 32]" does not support any of them. It is possible that petitioner intended to cite to The Court as this reference page 42 of the Clerk's Transcript, which does appear to have some support for the statements. That page does not contain admissions by Wallace, but rather is attached to the affidavit of petitioner that was submitted in support of his motion for a new trial. We quote petitioner's own description of this statement:

> "Further, attached is Exhibit A, by reference made a part hereof, purporting to be an arrest record of William Wallace, which record was compiled by a private investigation agency whose services this affiant employed for that purpose. It does not meet the formal requirements of an affidavit

or certified copy, but nonetheless might be of some assistance and information to the Court and all parties concerned, with regards to the credibility of said William Wallace." [Clk. Tr. p. 41.]

The other correction in Petitioner's Statement of Facts which California wishes to make is the following sentence:

"However, this [disbarment of petitioner's trial counsel] did not occur before the opinion of the District Court of Appeal was handed down in this case." (Petition, p. 6.)

The opinion of the California Supreme Court [*Hyland v. State Bar*], 59 Cal. 2d 765, 31 Cal. Rptr. 329, ordering petitioner's trial counsel disbarred (Petition, Appendix B) was filed on June 13, 1963; and was effective on July 12, 1963. The opinion of the District Court of Appeal affirming petitioner's conviction [*People v. Munton*, 218 A. C. A. 558, 32 Cal. Rptr. 508; Petition, Appendix A] was filed on July 23, 1963 and was effective on August 22, 1963.

Thus the disbarment *did* occur before the opinion which affirmed petitioner's conviction.

ARGUMENT.

I.

The Question Presented as to the Alleged Unconstitutionality of the California Oral Copulation Statute for Vagueness Should Not Be Reviewed by This Court.

A. The Contention as to Alleged Unconstitutionality for Vagueness Was Not Presented to Any State Court, and Is Raised for the First Time in the Petition.

One of the questions presented by the Petition should not be considered by This Court, since it has never been presented to the state courts, and has been raised for the first time in the Petition for Writ of Certiorari. This question presented is:

> "Whether Section 288(a) of the Penal Code of the State of California, inherently and as construed and applied in this case, is unconstitutional in that words therein are not defined by statute and are too vague, indefinite and uncertain to constitute penal legislation." (Petition, pp. 6-7.)

Most of the argument presented by Petitioner on pages 7-9 of the Petition is in support of this question.

This Court has often ruled that it will not consider a contention which is raised for the first time in the Supreme Court of the United States, and which has not been presented to the State Courts.

Nelson v. County of Los Angeles, 362 U. S. 1, 9;

Adler v. Board of Education, 342 U. S. 485, 496.

The opinion of the District Court of Appeal (Petition, Appendix A), is silent on this contention. Neither the Clerk's nor the Reporter's transcript reveal any refer-

ence in the trial court to an attack on the constitutionality of Section 288(a) of the California Penal Code on the ground it was vague.

Petitioner has included in the record the petition for hearing filed in the California Supreme Court. No reference was made in that petition to this contention.

Petitioner filed an opening brief with the District Court of Appeal, did not file a reply brief with the District Court of Appeal, did not argue the case orally in the District Court of Appeal, and did not file a petition for rehearing in the District Court of Appeal. California is filing with This Court by separate letter a copy of petitioner's opening brief in the District Court of Appeal. An examination of it will show that the vagueness contention was not presented to the District Court of Appeal in that brief.

B. The Authority Cited by Petitioner for His Vagueness Contention Is No Longer Good Law.

Most of Petitioner's argument (that the California oral copulation statute is unconstitutional for vagueness) is based on a long quotation from a 1941 opinion of the California District Court of Appeal: *People v. Angier*, 44 Cal. App. 2d 417, 418-19; 112 P. 2d 659, 660. (Quoted at pp. 7-9 of Petition.) More recently, the same court that authored the *Angier* opinion made this comment about the passage quoted by Petitioner.

> ". . . [The defendant] seeks refuge behind People v. Angier, (citation omitted) . . . [in that case,] this court was impressed that the mouth of the accused could not have touched the bodies of the children. . . . On reaching that conclusion we were led into a discussion of the

significance of the word "copulate." While that discourse was philologically correct it was calculated to lead to the erroneous doctrine that the use of the word in section 288a "signifies a legislative intent that an offender of the statute is guilty only when he has committed the repulsive act of sex perversion. Such was not the purpose of the lawmakers or the intention of this court. A person is guilty of violating the statute when he has placed his mouth upon the genital organ of another. . . . The Angier decision is not pertinent unless the factual situation under judicial consideration is in all essential details identical with those there adjudicated."

People v. Harris, 108 Cal. App. 2d 84, 88; 238 P. 2d 158, 160 (1951).

II.

Certiorari Should Not Be Granted to Review the Adequacy of Petitioner's Trial Counsel, Since the Record Is Plain That No Substantial Federal Question Is Presented.

The other main question presented by Petitioner (aside from the sufficiency of the evidence, which obviously does not present any *federal* question), is the contention that the due process clause of the Fourteenth Amendment of the United States Constitution has been violated, because of the inadequacy of petitioner's trial counsel. This contention may be separated into three parts:

A. Trial counsel was inadequate because he has been subsequently disbarred.

B. Trial Counsel was inadequate because he was mentally incompetent.

C. Trial Counsel's inadequacy is manifest from an examination of the Record.

California contends that none of these contentions afford a *substantial* federal question, and their unsoundness can be demonstrated from a brief look at the record.

By way of clarification, petitioner has been represented at all stages of this litigation by counsel. Moreover, petitioner has been represented at all stages by *counsel of his own choice*; at no stage has he utilized court appointed counsel.

Petitioner's present counsel is his third during this litigation. His first private counsel was W. J. Hyland. Mr. Hyland was counsel before and during the trial, and presented the first motion for new trial. Then petitioner obtained the services of his second private counsel, Mrs. Gladys T. Root. Mrs. Root represented petitioner (a) on the second and third motions for new trial at the trial level; (b) filed a brief in the District Court of Appeal; and (c) filed a Petition for Hearing in the State Supreme Court. Petitioner's present counsel, Morris Lavine Esq., has prepared the Petition for Writ of Certiorari.

A. The Subsequent Disbarment of Trial Counsel Does Not Constitute a Substantial Federal Question Regarding Petitioner's Conviction.

It is true that W. J. Hyland, who was petitioner's counsel during the trial of this litigation, has since been disbarred by the California Supreme Court. However we urge that the sequence of events be kept clear. Petitioner's trial in the Superior Court occurred during the month of April, 1961. Mr. Hyland's first motion for a new trial was made in July, 1961. [Clk. Tr. p. 35; Rep. Tr. pp. 257-294.]

Mr. Hyland's disbarment occurred on July 12, 1963, as a result of an opinion of the California Supreme Court which was rendered on June 13, 1963. The opinion is attached to the Petition as Exhibit B. An examination of it shows that there is no reference in it to Mr. Hyland's representation of petitioner in his criminal trial more than two years before.

Moreover, this contention could have been raised by petitioner to both the California District Court of Appeal and to the California Supreme Court. It was in fact raised to neither Court.

The opinion of the District Court of Appeal (that affirmed petitioner's conviction) was filed on July 23, 1963, which is 40 days *after* the State Supreme Court issued its opinion (on June 13, 1963) disbarring Mr. Hyland. Petitioner thus could have, but did not, filed a petition for rehearing with the District Court of Appeal and asserted the disbarment of his trial counsel. (No petition for rehearing was filed with the District Court of Appeal on any ground.)

Although petitioner *did* file a petition for Hearing with the State Supreme Court, on August 28, 1963, no mention was made in it of the disbarment of petitioner's trial counsel.

B. The Contention That Trial Counsel Was Inadequate Because He Was Mentally Incompetent Should Not Be Reviewed.

This contention is being raised for the first time by Petitioner in his Petition. It has not been presented to either the trial or appellate courts in California. The District Court of Appeal opinion, and the Petition for Hearing in the Supreme Court are silent on this point. The only reference to it in the record is a statement in

the opinion of the State Supreme Court disbarring petitioner's trial counsel, that Hyland made the contention in the state bar proceeding that he was mentally incompetent to manage his defense there. [Ex. B. to Petition, pp. 13-15.] Indeed, that opinion states that Mr. Hyland asserted that he recovered completely in December, 1960, which is prior to petitioner's trial in April and July, 1961.

California submits that since there is no authority to support the allegation that petitioner's trial counsel *was* mentally incompetent, and since the point could have been raised in the state courts, and was not, it should not be considered here.

C. An Examination of the Record Shows That Petitioner's Trial Counsel Was Not Inadequate.

Finally, petitioner contends that an examination of the record of the trial will show the inadequacy of the defense of petitioner put forth by his trial counsel. The Petition for Hearing filed with the State Supreme Court contains numerous allegations and examples to support this contention. To answer these, California is filing, by separate letter, a copy of its answer to the Petition for Hearing that was filed with the California Supreme Court, and that resulted in the denial of the Petition for Hearing by that Court.

We also wish to incorporate by reference the portion of the opinion of the District Court of Appeal, that considered and rejected this contention. This can be found at pages 3-5 of Appendix A to the Petition, and in *People v. Munitor*, 218 A. C. A. 558, 561-62, 32 Cal. Rptr. 508, 510. That Court said:

> "The contention, first to be considered, that defendant was inadequately represented by counsel

and thus deprived of a fair trial, requires a consideration of the showing made by defendant upon his motion for a new trial. Sixteen affidavits were filed in support of the motion. Among them were affidavits by Wallace and Bailey repudiating the testimony they had given at the trial. Upon the hearing of the motion Wallace testified that he had believed it was necessary for him to deny participation in the unlawful acts in order to enlist in the armed services, and he reaffirmed his former testimony. There was no showing that the matters to which the other affidavits related were newly discovered and for this reason alone, they could not have furnished a ground for granting the motion. (Pen. Code, §1181.)

"The affidavits were filed in support of defendant's contention that he had been deprived of due process in that he had not been adequately represented at the trial. There was a showing by affidavit that defendant's attorney was informed before the trial of the testimony that would have been given by the affiants and that he failed to call several of them as witnesses and failed to elicit in his examination of the others all that they knew that would have been helpful to defendant. The affiants were in the main employees of the defendant and their statements were designed to contradict the testimony of Wallace and Bailey in several particulars. Both Wallace and Bailey had testified that defendant induced them to drink considerable quantities of liquor and that he had caused them to disrobe and put on only trunks and that they remained in his office for consider-

able periods of time. The affidavits were generally to the effect that the affiants had never known defendant to use liquor or have it in his office, had never known him to have his office door locked and had never known Wallace to go to defendant's office and remain for more than a very few minutes. Such negative testimony could have made little impression upon the jury. One of the affiants would have testified to facts indicating that Wallace had upon other occasions indulged in unlawful sexual activities with other persons. It is now urged that although defendant's attorney was informed as to the testimony these persons would give he was grossly incompetent and negligent in not calling all of them as witnesses and in not developing the testimony of those who were called in greater detail. The contention that defendant was deprived of a fair trial through the incompetence of his attorney merits no extended discussion. Six of the persons who made affidavits had testified in the trial on defendant's behalf; they testified to the substance of the matters stated in their affidavits. The People's witnesses were vigorously and adequately cross-examined; such defense as defendant had was adequately presented. The showing made by defendant was manifestly inadequate to furnish support for his claim that he was denied his right to a fair trial."

Conclusion.

Respondent submits that an examination of the record, in light of the District Court of Appeal's opinion, discloses (1) the absence of any substantial federal question, that was (2) presented to the state courts at a timely stage of the proceedings for their review. It is therefore requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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